IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.35 OF 1997.

1. Shri Bablo Yeshwant Sawant.

2. Shri Ramnath Yeshwant Sawant,
both residing at Gulleli, Satari,
North Goa. ....
Appellants.

VERSUS

Shri Vishnu Rama Naik,
residing at Vantim, Satari,
North Goa. ....
Respondent.

Shri Amrut Kansar, Advocate for the Appellants.

Smt. A.A. Agni and Mrs. N.N. Narvekar, Advocates for the Respondent.

CORAM: N. A. BRITTO, J.

DATE: 9th DECEMBER, 2004.

ORAL JUDGMENT:

Plaintiffs in R.C.S. No.153/88 have filed this Second Appeal.

2. The suit filed by the plaintiffs for declaration, permanent injunction and other consequential reliefs was decreed by the learned Civil Judge J.D., Sattari by Judgment/Decree dated 21.10.1992, but the said judgment and decree were reversed by the learned Addl. District

Judge, Panaji by Judgment/Decree dated 1.2.97.

3. There is no dispute that the dispute between the parties was basically regarding possession of property having Alwara No.432 registered in Book No.19 in the Revenue Office of Sattari at Valpoi, known as 'Ontichem Xelte' surveyed under No.20/1 of village Vantem.

4. The case of the Plaintiffs was that the said paddy field was given originally to Shri Santoba A.tma Desai and after his death transferred to the name of his widow Smt. Sitabai Desai by Order dated 18.10.1930 and that the plaintiffs for 30 years or more were cultivating the same through their labourers Shri Laxman Sanvordekar and Shri Yeshwant Sanvordekar and his family members and that the rent (foro) in respect of the same was regularly paid by the plaintiffs in the name of the said Santoba A. Desai and/or in the name of Smt. Sitabai Desai. The plaintiffs also stated that the defendant's name was entered by an error in the column of Record of Rights in respect of the said paddy field and therefore they made an application in the year 1977 to the survey authorities to delete the name of the defendant from the said records, but the said application was dismissed by the Talathi, but they having filed an appeal to the Deputy Collector, the Deputy Collector was pleased to set aside the Order of the Talathi and the case was remanded for fresh trial. The plaintiffs stated that inspite of the said pending case, being disputed case No.29/1 Vantem, the survey records were promulgated.

The plaintiffs claimed that they were the owners and exclusive possessors of the said paddy filed and that the defendant had tried to interfere with their possession, but his attempts failed due to the timely steps taken by the plaintiffs, but on 13.12.1988 the defendant once again tried to disturb the said possession of the plaintiffs. The plaintiffs therefore filed the said Civil Suit on or about16.12.1988.

5. Contesting the claim of the plaintiffs, the defendant denied that the plaintiffs had inherited the said paddy field. The defendant pleaded that for the last 30 years the defendant and prior to that his father was in cultivatory and physical possession and enjoyment of the said paddy field as their own and the defendant also pleaded specifically the ownership of the same by adverse possession. The defendant denied that for over 30 years or more the plaintiffs were cultivating the said paddy field through the said labourers or their family members. The defendant admitted that the plaintiff No.1 had filed two different applications before the A.K., Record of Rights, in respect of survey No.18/1 which was withdrawn by plaintiff No.1 and the application as regards this paddy field was dismissed.

6. This Second Appeal was admitted by Order of this Court dated 19.9.97 which is at page 57 of the paper book on four substantial questions of law. I do not propose to refer to questions No.1, 3 and 4. Question No.2 reads as follows :-

'Whether presumption to the entry in Form I/XIV can be given under S.105 of the Goa Land Revenue Code when the proceeding is pending before the Revenue Authority and the Revenue Authority itself has come to a finding that the matter is required to be decided by the Civil Court '.

7. Smt. Agni, the learned counsel on behalf of the defendant, in support of the submission that none of the questions on which this appeal was admitted are substantial questions of law has placed reliance on the cases of **Kondiba Dagadu Kadam v. Savitribai Sopan Gujar and others [(1999) 3 S.C.C. 722] and Santosh Hazari v. Purushottam Tiwari (dead) by Lrs. (2001 AIR SCW 723)**.

8. In the first case of Kondiba Dagadu Kadam (supra) the Hon'ble Supreme Court has stated that the memo of appeal must precisely state the substantial questions of law involved and the High Court is obliged to satisfy itself regarding the existence of such a question and the appeal is required to be heard on the question so formulated, but the respondent has a right to argue at the time of hearing of the appeal that the case did not involve any substantial question of law. The Hon'ble Supreme Court also held that the proviso to Section 100 C.P.C. acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it with the object of ensuring that no

injustice is done to the litigant when such a question was not formulated at the time of admission either by mistake or by inadvertence. The Supreme Court also held that the High Court cannot substitute its opinion for the opinion of the first appellate court, unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or it is settled position on the basis of pronouncements made by the Apex Court or was based upon inadmissible evidence or arrived at without evidence. The Supreme Court further held that if the question of law termed as substantial question stands already decided by a larger Bench of the High Court or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on the facts of the case would not be termed to be a substantial question of law. Where a point of law has not been pleaded or is found to be arising between the parties in the absence of any factual format, a litigant should not be allowed to raise that question as a substantial question of law in second appeal. The mere appreciation of the facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law. But where it is found that the first appellate court has assumed jurisdiction which did not vest in it, the same can be adjudicated in the second appeal, treating it as a substantial question of law. Where the first appellate court is shown to have exercised its discretion in a judicial manner, it cannot be termed to be an error either of law or of procedure requiring interference in second

appeal.

9. In the second case of **Santosh Hazari** (supra) the Supreme Court stated that the phrase ' substantial question of law ' as occurring in amended Section 100 is not defined in the Code. The word substantial, as qualifying 'question of law' , means - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical of no substance of consequence, or academical merely. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable

obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life any lis.

10. As already stated, the trial Court had decreed the suit of the plaintiffs, but the first appellate court reversed the said Decree and in doing so essentially relied on the said entry of the name of the Defendant in Form No.I and XIV and therefrom drew the statutory presumption that the said entry was not proved to be wrong. In my view, the question reproduced hereinabove is a substantial question of law which emerges from the finding of fact arrived at by the first appellate court and therefore it is necessary to decide that question for a just and proper decision of the case, as held by the Apex Court in the case of Santosh Hazari v. Purushottam Tiwari (supra) .

11. The first point which requires to be considered is the application dated 22.3.2004 which the plaintiffs have filed before this Court seeking leave to produce a certified copy of the Inventory proceedings held upon the death of Sitabai Desai being Inventory proceedings No.12/96. By virtue of the said Inventory proceedings, it appears that both the plaintiffs have been allotted the suit property.

12. The production of the said certified copy of the said Inventory proceedings has been objected on behalf of the defendants, by submitting that none of the predicates of the provisions of Order 41, Rule

27 have been complied with and that the said proceedings were initiated only after notice in First Appeal filed by the defendant was served upon the plaintiffs. It is also submitted that the said proceedings are unilateral and therefore would not bind the defendant.

Order 41, Rule 27 deals with production of additional evidence in Appellate Court. Sub-Rule (1) provides that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary in the Appellate Court. But if -

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

Sub-Rule (2) further provides that whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission. In support of the objection, Smt.

Agni, the learned counsel has placed reliance on the case of **N. Kamalam (dead) and another v. Ayyasamy and another [(2001) 7 S.C.C. 503]** and in the case of **Sardar Dastur Schools Trust and others v. Adil Jamshed, Frenchman since deceased through his legal heirs and representatives (2003 (1) Mh.L.J. 226)**.

13. In the case of N. Kamalam (supra) the Supreme Court observed that the provisions of Or.41, R.27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal – it does not au athorcisceny launae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way. The Supreme Court further held that in **Municipal Corpn. of Greater Bombay v. Lala Pancham** (A.I.R. **1965 S.C. 1008)** it had held that the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. Reiterating what was stated in the case of Municipal Corpn. of Greater Bombay, the Supreme Court stated thus :-

"This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the

evidence that the appellate court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports 'in a large measure' the plaintiffs' contention about fraud and mala fides. We shall deal with these documents but before that we must point out that the power under clause (b) of sub-rule (1) of Rule 27 cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision. "

14. In the case of Sardar Dastur v. Adil Jamshed (supra) this Court referred to the case of **Gurdev Singh & Ors. v. Mehnga Ram & anr.** (A.I.R. 1997 S.C. 3572) and held that no case of due diligence was made out for the purpose of the production of the additional evidence in terms of Order 41 Rule 27(b) Civil Procedure Code nor the documents sought to be produced were described with sufficient details regarding such documents and the documents were beyond the scope of pleadings and therefore the Court proceeded to set aside the order of production of additional evidence.

15. Admittedly, the Inventory proceedings were finally disposed of on 20.2.97 i.e. after the disposal of the First Appeal. The plaintiffs have sought to produce a certified copy of the said Inventory proceedings. On principle there could be no reasonable objection for its production

because the said document came into existence after the disposal of the First Appeal. Nevertheless since this Second Appeal is being decided only on a substantial question of law, in my view, it is not at all necessary to take the said certified copy on record for the purpose of deciding this Second Appeal. Hence the application is hereby rejected.

16. The plaintiffs had clearly pleaded that in the year 1977 they had made an application to the survey authorities to delete the name of the defendant from the survey records. Presumably at that time the defendant's name might have been recorded in Form No.III and not on Form I & XIV. The plaintiffs had further pleaded that the Talathi had dismissed their application and the order of dismissal was challenged before the Deputy Collector and the Deputy Collector thereafter had allowed the appeal and had remanded the case for a fresh decision. The plaintiffs had further pleaded that no date was fixed for fresh trial of the said disputed case bearing No.20/1 Vantem but in the meantime the records of the suit property were promulgated by the Collector inspite of the pending disputed case. By way of answer to the said pleadings of the plaintiffs, the defendant had admitted that the survey was promulgated inspite of the plaintiffs having disputed the entry in the name of the defendant in Form No.III. The said dispute between the plaintiffs and the defendant came to be decided by the Awal Karkum on 22.9.89. In the said decision, although the Awal Karkun observed that the plaintiffs were in peaceful possession and enjoyment of the suit property, the said Awal

Karkun proceeded to reject the said objection of the plaintiff No.1 dated 2.8.77 to the entry of the name of defendant no.1 in Form No. III by observing that:

" The application of Shri Bablo Yeshwant Sawant dated 2.8.1977 regarding landed property surveyed under No.20/1 situated in the village of Vantem Sattari Taluka is hereby rejected as the claim being of civil nature. However the applicant may get his right established over the suit property through proper forum and may get it reflected in the land records accordingly if he at all desire so '.

17. It was submitted by Smt. Agni, the learned counsel on behalf of the defendant, that the plaintiffs had filed an appeal against this Order of the Awal Karkun dated 22.9.89 particularly as regards the observation of peaceful possession and enjoyment of the suit paddy field by the plaintiffs, which was rejected. However, the said judgment is not part of the Records and proceedings either of the trial court or the first appellate court.

Section 105 of the Land Revenue Code reads as follows :-

" Presumption of correctness of entires in record of rights and register of mutations. - An entry in the record of rights, and a certified entry in the register of mutation shall be presumed to be true until the contrary is proved or a new entry is lawfully substituted

therefor. “

18. In my view there can be no dispute about the proposition that once an entry is made in the Record of Rights by following the provisions of the Land Revenue Code, 1968 a presumption as contemplated by Section 105 has to follow it. However, as far as this case is concerned, the dispute raised by the plaintiffs regarding the entry of the name of the defendant was not decided finally and on its merits by the survey authorities and as admitted by the defendant at the time of promulgation of the survey record the said dispute was pending. In case the dispute was pending the name of the defendant could not have been transferred from the Register of Disputed cases to the Register of record of rights, and, in such a situation any promulgation done due to mistake would not give rise to a presumption available under Section 105 of the said Code. The benefit of presumption was certainly not available to the defendant, as held by the first appellate court.

19.However, the matter cannot be allowed to end there. The learned First appellate court has not at all considered the entire evidence produced by the Plaintiffs in reversing the findings of the learned trial Court. Although the defendant had pleaded that he was in possession of the suit property for about 30 years, that plea was diluted in the course of his evidence when the defendant admitted that he was not in possession from the date of filing of the suit probably because of the

injunction order passed by the learned trial Court against the defendant. The admitted position is that from the date of filing of the suit till date it is the plaintiffs who are in possession of the suit property. In case the defendant had to prove earlier possession, the defendant's evidence on that aspect had to be weightier. This aspect of the case was not at all considered by the learned first appellate court who went on the assumption that the defendant was in possession of the suit property. The plaintiffs had produced the documents of title namely the 'Alvara' which first stood in the name of Santoba Atma Desai and which thereafter was transferred in the name of his widow Smt. Sitabai S. Desai. The plaintiffs had consistently pleaded that they had come in possession of the suit property being the nephews of the said Smt. Sitabai S. Desai and this fact although was denied by the defendant in the written statement was again categorically stated by P.W.1 Bablo as well as P.W.2 Laximan. Both P.W.1 Bablo and P.W.2 Laximan had categorically stated that the plaintiffs were the nephews of the said Sitabai and although that was denied on behalf of the defendant, the defendant himself in his evidence had failed to categorically state that they were not the nephews of the said Sitabai. In such a situation the evidence produced by the plaintiffs that they were the nephews of the said Sitabai could not have been simply brushed aside. The plaintiffs had also produced documents relating to the payment of rent first in the name of the said Santoba and thereafter in the name of the said Sitabai which receipts also reflected

the name of plaintiff no.1. This aspect of the case was rightly considered by the learned trial Court and which has been ignored by the learned first appellate court. In case the plaintiffs were not in possession of the suit property they would not have continued to pay the rent in the manner done by them. Although the defendant claimed to be in possession of the suit property, the defendant had not at all explained as to how he had come in possession of the suit property when it was otherwise impliedly admitted by the defendant that the suit property was known as ' Vantem ' given on Alwara to the said Santoba. The learned Advocate Smt. Agni has brought to my notice the provisions of S.36 of Decree No.3602 dated 24.11.1917 under which the land assigned by the Government should revert back to the Government in the case of the assignee dying heirless. There is no doubt that S.36 of the said Decree provides for cases for reversion of the land assigned and one of the cases being when the assignee dies without any heirs. However, this provision is of no assistance to the defendant because that is a matter to be decided between the plaintiffs on one hand and the Government on the other nor does it affect the possession of the plaintiffs till it is taken back by the Government from them.

20. The learned trial court was also right in placing reliance on the evidence of P.W.2 in preference to the evidence of D.W.2 because the name of the former was appearing in the plaint as one of the labourers of

the plaintiffs. It is true that P.W.2 had admitted that for about a year he was not in talking terms with the defendant. He had refused to admit that he was on inimical terms with the defendant. Only because he was not in talking terms with the defendant for a year was not enough for the first appellate court to have rejected his evidence without there having been any reason why he had stopped talking to the defendant when otherwise his name was pleaded by the plaintiffs as one of the persons through whom they were cultivating the paddy field. The learned Trial Court was justified in placing reliance on the evidence of P.W.2 in preference to the evidence of D.W.2 who had not at all supported the case of the defendant. It was not the case of the defendant that he was in any way related to the said Santoba or his widow Sitabai. As already stated, the defendant had not explained as to how he had come in possession of the property which was granted to Santoba and then to his widow Sitabai. On the other hand, the plaintiffs had produced the documents of payment of tax/foro first in the name of the said Santoba and then in the name of Sitabai and this aspect of the case certainly fortified the claim of possession of the plaintiffs as rightly held by the learned trial Court and which aspect was completely ignored by the first appellate court.

21. In view of the above, the claim to possession of the suit property by the plaintiffs in terms of para 19(b) of the plaint could not be rejected in whatever angle one looks at the case of the plaintiffs and the defendant.

The plaintiffs obviously could not be declared to be the owners of the suit property because the suit property admittedly did not belong to them and it was on lease from the Government inasmuch as the other successors of the said Sitabai were not impleaded as parties.

22. In view of the above, the substantial question of law is answered in the negative and in favour of the plaintiffs.

23. Consequently the judgment/decree of the first appellate court dated 1.2.1997 is hereby set aside and that of the learned Trial Court dated 21.10.1992 is partly restored. In other words, the suit of the plaintiffs shall stand decreed only in terms of prayer clause (b) of the plaint an with costs in favour of the plaintiffs, throughout.

N. A. BRITTO, J.

sl.